81-39

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ALEXANDER L. STEVAS,
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Case. No.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM : 1981

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RAYMONDE SHAMSEE,

Petitioner,

-against-

UNITED NATIONS JOINT STAFF PENSION FUND, ARTHUR C. LIVERAN, as Secretary of the United Nations Joint Staff Pension Fund, and THE UNITED STATES OF AMERICA,

Respondents.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the sequestration of pension funds of retired United Nations employees an activity subject to treaty or statute immunity?

2. Was the court below correct in determining that the United Nations Joint Staff Pension Fund falls within the ambit of United Nations immunity without permitting a hearing on the matter?

3. Do state courts have ancillary jurisdiction to mandamus a federal executive?

Note: In addition to the parties set forth in the caption, Mudassir Ali Shamsee was a party to the underlying proceeding, but is not a party to the matters sought to be reviewed.

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Opinion of New York State Supreme Court, County of Queens dated August 31, 1979 (not officially or unofficially reported).

Order of New York State Supreme Court, County of Queens dated April 27, 1979 (not officially or unofficially reported), and companion decision of February 20,1979

Order of New York State Supreme Court, County of Queens dated September 8, 1979 (not officially or unofficially reported).

Order of New York State Supreme Court, County of Queens dated July 31, 1978 (not officially or unofficially reported).

Order of New York State Supreme Court, County of Queens dated June 2, 1978 (not officially or unofficially reported).

Order of New York State Supreme Court, County of Queens dated May 24, 1978 (not officially or unofficially reported).

Sequestration order of New York State Supreme Court, County of Queens dated December 20, 1976 (not officially or unofficially reported).

JURISDICTION OF THE COURT

The judgment sought to be reviewed was entered in the Court of Appeals of the State of New York on April 7, 1981. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. 1254(1), as this is a petition for a writ of certiorari solely involving a substantial federal question. The petition is from a final determination of the highest court of New York State.

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS

Headquarters Agreement of the United Nations : 12 et seq. U.N. Treaty Series

1947

"Section 8. The United Nations shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district."

"Section 7(b) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local laws shall apply within the headquarters district."

"Section 7(c) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the headquarters district as provided in applicable federal, state and local laws."

Convention on the Privileges and Immunities of the United Nations

"Section 20: Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations."

United Nations Staff Rule 1.8

"The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for nonperformance of their private obligations or failure to observe laws and police regulations."

Foreign Sovereign Immunities Act of 1976

(28 U.S.C. 1601 et seq.)

"Under international law, states are not immune from the jurisdiction of foreign courts insofar as their com-

mercial property may be levied upon for the satisfaction of judgments rendered against them in connection with any commercial activities."
28 U.S.C. 1602

"A foreign state shall not be immune from the jurisdiction of the courts in any case....
(2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect on the United States."
28 U.S.C. 1605(a)

"A foreign state...includes an agency or instrumentality of a foreign state;

An agency or instrumentality of a foreign state means any entity...(3) which is neither a citizen of a State of the United States...nor created under the laws of any third country."
28 U.S.C. 1603

International Organizations Immunities Act

(28 U.S.C. 288 et seq.)

"The President shall be authorized...to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions and

immunities provided for in this subchapter...or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption or immunity."
28 U.S.C. 288

"International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."
28 U.S.C. 288a(b)

"...employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such...employees except insofar as such immunity may be waived by the... international organization concerned."
28 U.S.C. 288d

United Nations Staff Rule 103.18(b)(iii)

(b) Deductions from salaries, wages and other emoluments may also be made for the following purposes:...
(iii) For indebtedness to third parties when any deduction for this purpose is authorized by the Secretary-General.

STATEMENT OF FACTS

Petitioner was married to Mudassir Ali Shamsee for over 20 years prior to the entry of a support decree in the Supreme Court of the State of New York, County of Queens granting her $200.00 weekly. Throughout that period Mr. Shamsee remained a Pakistani national but resided in New York State and was employed by the United Nations.

Approximately six months after the support decree was entered, Mr. Shamsee retired from his United Nations position and surreptitiously fled to Pakistan, taking with him all the family's assets. He was, however, unable to remove the considerable pension benefits accrued with the United Nations Joint Staff Pension Fund. As soon as petitioner learned of her husband's departure, she obtained a sequestration order from the Queens County

Supreme Court, which was duly served upon the Pension Fund by service upon Mr. Liveran, its chief executive officer.* These parties, however, refused to respond to that order and after further proceedings, they were eventually held in contempt thereof. They thereupon moved to set aside the contempt order on the ground that they were immune from jurisdiction of that Court. The Queens County Supreme Court did not conduct a hearing or rule on immunity; rather it directed the President of the United States to determine pursuant to 22 U.S.C. 288 whether respondent had so abused its exercise of immunity (if same existed) to warrant its revocation. The Pension Fund and Mr. Liveran appealed, and the United States of America joined in that

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*Service was made within the State of New York and not on United Nations premises.

appeal because of the directive to the President. The Appellate Division of the New York State Supreme Court reversed and dismissed the entire proceeding, finding that the Pension Fund and Mr. Liveran were immune from State process without need for a hearing, and further finding that the State court had no mandamus power against the federal executive. The New York State Court of Appeals affirmed, and it is from that decision that petitioner seeks certiorari.

Petitioner maintains that even were the United Nations itself a party to this action, immunity would not apply as this is purely a commercial transaction, outside its ambit. Petitioner further maintains that even were there some immunity existent for the United Nations in

this situation,* same would not extend to the Pension Fund, which is a separate entity, maintaining a separate fund and with many members and a majority of directors who are not United Nations employees, and which has neither treaty nor statutory immunity. Petitioner maintains that the above cannot be determined under due process of law without a hearing and that state courts have ancillary jurisdiction to mandamus a federal executive.

All issues raised in this petition, except the mandamus issue, were raised in the court of first instance and in all appellate courts, since respondent argued from the inception that it had statutory

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*The Court should note that were the United Nations a party, this appeal would never have arisen since its Staff Rules, in contradistinction to those of the Pension Fund, specifically honor support sequestration orders.

and treaty immunity and opposed the mandamus order. The mandamus issue was raised in all state appellate courts by the United States of America when it intervened in this action.

ARGUMENT

POINT I

The United Nations does not have treaty or statutory immunity for commercial transactions.

For the purpose of this argument only, the Court may assume that respondent is part of the United Nations. That is not petitioner's position, as is set forth later in this petition.

In recent years courts have recognized that treaty or statutory immunity extended to sovereign entities does not embrace purely commercial transactions. This concept is embodied in the Foreign Sovereign Immunities Act of 1976 with regard to sovereign states (p. 8 , supra) and the International Organizations Immunities Act with regard to international agencies (p. 9 , supra). Alfred Dunhill of London, Inc. v. Republic of China, 425 U.S. 682 (1976); United Euramu v. U.S.S.R., 461

F.Supp. 609 (S.D.N.Y., 1978); Outboard Marine Corp. v. Pezetal, 461 F.Supp. 384, (D.Del., 1978); Texas Trading and Milling Corporation v. Federal Republic of Nigeria (2nd Circuit Docket No. 80-7703, April 16, 1981). The underlying activity -- sequestration of a pension fund -- is purely commercial and unrelated to the political and diplomatic functions of the United Nations. Although the United Nations is certified as an international organization entitled to I.O.I.A. immunity, that immunity is only equal to what is enjoyed by foreign governments (28 U.S.C. 288(a)(b)), which under the Foreign Sovereign Immunities Act, does not include commercial transactions (28 U.S.C. 1604(a)) This is no way varied by United States treaties with the United Nations. The Headquarters Agreement (p. 7 , supra) bars enforcement laws inconsistent with United Nations regulations. United Nations Staff Rule 103.18

(b)(iii), however, specifically honors sequestration orders. Moreover, the Convention on Privileges and Immunities of the United Nations (p. 8 , supra) specifically excludes immunity for personal benefit of individuals. The immunity claimed here, if upheld, would benefit no one except Mr. Shamsee. It does not make the slightest difference to the United Nations or to the Pension Fund whether it pays these benefits to petitioner or to her husband.* Since the transaction is commercial and the United Nations has no contrary

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*Pension funds in New York State are subject to sequestration and attachment orders. Lowery v. Spector, 430 N.Y.S.2d 767, ___ A.D.2d ___ (4th Dep't, 1980); Nat'l Bank, etc. v. Intern. Broth., etc., 400 N.Y.S.2d 482 (S. Nassau, 1977), aff. with opinion, 69 A.D.2d 679, 419 N.Y.S.2d 127 (2d Dep't, 1979), app.dism., 48 N.Y.2d 752, 422 N.Y.S. 2d 666 (1979); Plymouth Rock Fuel Corp. v. Bank of New York, 425 N.Y.S.2d 908 (A.Term 2d, 1979).

rule,* even were the Pension Fund deemed to otherwise fall within the purview of the United Nations statutory or treaty immunity, same would not be applicable to the case at bar.

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* The United Nations is deemed to be within the State of New York, and New York law applies unless there is a specific United Nations rule to the contrary. Headquarters Agreement, Sections 7b and 7c; People v. Weiner, 378 N.Y.S.2d 966, 85 Misc.2d 161; (Crim. N.Y. 1976); People v. Coumatos, 244 N.Y.S.2d 507 (Gen.Sess.N.Y. 1962), aff'd 20 A.D.2d 850, 247 N.Y.S.2d 1000 (A.D.1st 1964). The United Nations itself has a rule specifically honoring sequestration orders which should bind the Pension Fund if indeed it is part of that organization. The Pension Fund itself has no rule concerning honoring sequestration (or any court) orders one way or the other. Its Director, Mr. Liveran, simply took the position that the absence of any rule meant that such orders could not be honored.

POINT II

The Court could not determine that the Pension Fund or its executive are entitled to United Nations immunity without a hearing.

The Pension Fund admittedly has no separate treaty with the United States, nor has it been certified as an international organization within the purview of the International Organizations Immunities Act.* Therefore, its only means of gaining immunity would be under the umbrella of the United Nations.

Whether the Pension Fund is a sufficiently integral part of the United Nations to entitle it to immunity cannot

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*Merely because an organization has an affiliation with the United Nations does not automatically bring it within the ambit of United Nations immunity. For example, UNESCO (Exec. Ord. 9863, 12 Fed. Regs. 3559) and UNRRA (Exec. Ord. 9698, 11 Fed. Regs. 1809) were separately granted immunity.

be determined without a hearing. On one hand, its offices are in the United Nations Building and at least some of its regulations are subject to approval by the United Nations General Assembly. On the other hand, its funds are kept separate from those of the United Nations; it has many members* and a majority of directors who are not affiliated with the United Nations; and it often adopts regulations and takes positions, as in this case, in direct contradiction to those of the United Nations. Despite this, the appeals courts of New York State found that the Pension Fund had United Nations umbrella immunity solely upon the certification of the United States Department of State. These courts, however, ignored the fact that since the adoption of the Foreign Sovereign Immunities Act of 1976, certification by the Department of State is not conclusive but evidentiary, with the burden

* For example, the World Health Organization, UNESCO and the International Labor Organization.

of proof upon the agency claiming immunity. National American Corp. v. Federal Republic of Nigeria, 448 F.Supp. 632, 638 (S.D.N.Y. 1978); Jet Line Services, Inc. v. Marsa El Hariga, 462 F.Supp. 1165 (D.Md., 1978); Behring International v. Imperial Iranian Air Force, 475 F.Supp. 383, 396 (D.N.J., 1979). See also United States v. Fitzpatrick, 214 F.Supp. 425, 433 (S.D.N.Y., 1963).

Unless the Pension Fund has immunity, Mr. Liveran cannot possibly be immune because of his employment by that fund. Therefore, the determination of the rights of the Pension Fund also determine his rights.*

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*The Court should be aware that petitioner attempted to resolve this matter by appealing the Pension Fund's position to its Administrative Tribunal. The Tribunal stated:

> "...it is obvious that the privileges and immunities of the United Nations cannot serve the purpose of dispensing them from the fulfilment of their private obligations. Yet

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> the present case showed that retired staff members can, indirectly, benefit unduly from the immunities of the Staff Pension Fund itself and from lack of a provision similar to Staff Rule 103.18(b)(iii) in the Pension Fund Rules." Administrative Tribunal Decisions #245 (May, 1979)

and directed the Pension Fund to reconsider its position and adopt a rule to accord with the general United Nations Staff Rule. However, although more than two years have elapsed since that decision, the Pension Fund has not acted on the matter.

POINT III

State courts have ancillary power to mandamus federal executives.

In McClung v. Stillman, 19 U.S. 598 (1821) the Supreme Court held that a mandamus action could not be brought against a federal official in a state court. However, where a state court has jurisdiction for other reasons, it can mandamus a federal official ancillary to that basic jurisdiction. Board of Commissioners of Knox County v. Aspinwall, 24 How 376, 65 U.S. 376 (U.S. Cir. Ct., 1860); Riggs v. Johnson Co., 73 U.S. 166 (1867). The basic jurisdiction in the case at bar -- a matrimonial action between residents of the same state -- was clearly within the jurisdiction of the New York State court. Only in the course of enforcement proceedings ancillary to that jurisdiction did the question mandamus arise. The particular action in question -- determining if immunity should

be revoked pursuant to 28 U.S.C. 288 -- is purely ministerial and therefore within the purview of mandamus. The court was not directing what determination the federal executive would make but solely that he make a determination, which is something that he must do under the law whenever, as here, an issue of possible abuse of immunity arises.

REASONS FOR ALLOWING WRIT

The decision of the New York State court of last resort is in conflict with decisions of several circuit courts of appeal including the Second Circuit, which includes the State of New York, insofar as it holds that determinations of immunity can be made without a hearing and solely on the certification of the Department of State and further insofar as it holds that immunity extends to purely commercial transactions. Therefore, unless this Court reviews the matter, the law on this point will differ according to whether a party sues in a state or a federal court in direct contravention of the Erie Railroad v. Tompkins doctrine.

Beyond that, the question of the scope of immunity granted to the United Nations in terms of the transactions it embraces and of the autonomous agencies

that may or may not be in its purview* is a crucial matter for this Court to determine.

Finally, the question of whether a state court may mandamus the federal executive ancillary to its jurisdiction is a federal question important to our structure of government and one upon which this Court has not passed for over a century.

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* There are thousands of United Nations employees, such as Mr. Shamsee, who live in the metropolitan New York area whose lives involve a myriad of situations, such as the Shamsee marriage, having nothing to do with United Nations functions but who thereby may incur liabilities collectible only from salaries or other funds owed or held by the United Nations. Were statutory or treaty immunity deemed to extend to these situations, it would be impossible for commercial establishments to trade with these people on any type of credit basis.

APPENDIX

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK - APRIL 7, 1981:

"2 No. 202
Raymonde Shamsee,

Appellant,

v.

Muddassir Ali Shamsee,

Defendant,

United Nations Joint Staff
Pension Fund & Ano.,

Respondents.

Order affirmed, with costs, for reasons stated in the opinion by Mr. Justice David T. Gibbons at the Appellate Division (74 A D 2d 357).
All concur."

DECISION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT DATED MAY 19, 1980:

"SUPREME COURT : APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

LAZER, J.P., MANGANO, GIBBONS and
MARGETT, JJ.

RAYMONDE SHAMSEE,

Respondent,

-against-

MUDDASSIR ALI SHAMSEE,

Defendant.

UNITED NATIONS JOINT STAFF
PENSION FUND et al.,

Appellants.

APPEAL from an order of the Supreme Court at Special Term (JOSEPH S. CALABRETTA, J.) dated August 31, 1979 and entered in Queens County, which (1) denied appellants' renewed motion to vacate certain prior orders of the same court holding the United Nations Joint Staff Pension Fund and its Secretary in comtempt of court for failure to pay the plaintiff wife, pursuant to a sequestration order of the same court, moneys on deposit with the Fund and held for the defendant husband and ordering the Secretary's arrest and commitment to the County Jail for failure to purge himself

of contempt, (2) directed the United States Attorney to refer the matter of the Fund's immunity from legal process to, inter alia, the President of the United States for a purported ruling pursuant to section 288 of title 22 of the United States Code, and (3) postponed further argument on vacating the contempt orders pending action by the Board of the Pension Fund in connection with a proposal authorizing a wavier [sic] of immunity.

G I B B O N S, J. Mudassir Ali Shamsee and Raymonde Shamsee were married in 1956 and resided in Jamaica, Queens. Mr. Shamsee is a Pakistani national and a retired employee of the United Nations. In 1975, after marital difficulties developed, Mrs. Shamsee brought an action for support in the Supreme Court, Queens County, and was awarded the sum of $200 per week. Thereafter Mr. Shamsee retired from his United Nations employment and returned to Pakistan, allegedly taking with him all of the family assets, including the entire contents of the marital home.

In December, 1976 Mrs. Shamsee obtained a sequestration order against her husband, whose chief remaining asset in this country is a share in the United Nations Joint Staff Pension Fund. The Fund's Secretary, Arthur C. Liveran, declined to comply with the sequestration order, invoking immunity from legal process for the Fund and for himself in his official capacity under the Convention on the Privileges and Immunities of the United Nations (21 UST 1418, TIAS 6900, §§2, 3, 18 [eff April 29, 1970]) and under the International Organizations Immunities Act (US Code, tit 22, §288 et seq.). By a decision and order dated, res-

pectively, May 24 and June 6, 1978, Special Term held the Fund and its Secretary in contempt of court for failure to comply with the dequestration order and ordered them to purge themselves of contempt by turning over Mr. Shamsee's pension assets to his wife as receiver, and in the event of a failure to do so, ordered the issuance of a warrant for the Secretary's arrest.

After Special Term again issued orders citing the Fund and its Secretary for contempt and ordering the Secretary's arrest, the United States Attorney, at the request of the United States Department of State, appeared on behalf of the United Nations appellants and was granted a stay of the Secretary's arrest pending a determination of the question of immunity. Two affidavits were submitted to the court. The first was an affidavit of Erik Suy, Under-Secretary-General and Legal Counsel of the United Nations, attesting to the fact that the Fund is an organ of the United Nations, regulated by the General Assembly; that its assets are the property of the United Nations, immune from process by virtue of treaty and statute; and that the Secretary of the Fund is appointed by the Secretary-General of the United Nations, and is likewise immune for acts performed in his official capacity. The second affidavit was sworn to by Sol Kuttner, an official of the Department of State assigned to the United States Mission to the United Nations, responsible for maintaining records concerning United Nations officials entitled to immunity. Mr. Kuttner stated that Arthur C. Liveran 'was duly notified * * * as a professional employee of the United Nations Secretariat * * * [and] is and has been employed by the United Nations as Secretary of the United Nations Joint Staff Pension Board' and thus is entitled

to immunity for acts performed in his official capacity.

In February, 1979 Special Term denied a motion to vacate its prior orders, finding 'no adequate proof that an official of the State Department with the proper authority has actually determined the merits of the claim of immunity.' In a subsequent ex parte order, the court ordered the United States Attorney, among other things, to seek a 'formal opinion' from the Department of State on the immunity question. The United States thereafter produced a State Department certificate attesting to Mr. Liveran's status as a professional employee of the United Nations Secretariat and as Secretary of the United Nations Joint Staff Pension Fund. Further, a letter from the State Department's Deputy Legal Adviser expressed the view that the Fund and its Secretary are entitled to immunity from the sequestration order. The certificate and the letter were submitted in support of a renewed motion to vacate the prior contempt and commitment orders.

By decision dated August 31, 1979, Special Term denied the motion but continued to stay enforcement of the prior orders. The court additionally directed the United States Attorney 'to refer this matter to the Attorney General, who shall, in turn, refer it to the President of the United States" for a purported 'ruling' on the immunity question pursuant to section 288 of title 22 of the United States Code. The resulting order is the subject of this appeal.

The order appealed from must be reversed and the prior orders of contempt and commitment vacated. With the discon-

tinuance of the Executive Branch practice of making suggestions of immunity, which when recognizing and allowing a claim of immunity were deemed binding on the courts (Ex parte Peru, 318 US 578; Matter of United States of Mexico v Schmuck, 293 NY 264, 271-272, rearg granted 294 NY 265; cf. Compania Espanola de Navegacion Maritima, S.A. v The Navemar, 303 US 68), the question of immunity from legal process under treaties and statutes of the United States lies within the province of the courts, which are bound by the Constitution to follow the 'the supreme Law of the Land' (US Const, art VI, cl 2). While the Executive Branch continues to advise the courts on matters relating to immunity which are within its unique knowledge and competence and its opinion on the interpretation of treaties is entitled to 'great weight' (Kolovrat v Oregon, 366 US 187, 194), claims of immunity must be resolved by the court on the basis of the facts properly before it (see Menon v Weil, 66 Misc 2d 114; Matter of 'Anonymous' v 'Anonymous', 44 Misc 2d 14; Tsiang v Tsiang, 194 Misc 259). Special Term thus erred in its insistence on proof that the State Department has passed upon the immunity claim at bar and in its order to the United States Attorney to obtain a formal opinion on the question. Moreover, in our opinion, the facts in this case establish beyond doubt that the United Nations Joint Staff Pension Fund and its Secretary are immune from the sequestration order at Special Term under the applicable Federal law.

The conclusion of immunity may be reached independently on either of two legal grounds. Section 2 of the Convention on the Privileges and Immunities of the United Na-

tions (21 UST 1418, TIAS 6900) to which the United States became a party on April 29, 1970, confers immunity from 'every form of legal process', except insofar as expressly waived, on '[t]the United Nations, its property and assets wherever located and by whomsoever held'. Section 18 (subd [a]) of the same Convention grants functional immunity to officials of the United Nations 'in respect of words spoken or written and all acts performed by them in their official capacity'. In a similar tenor, the International Organizations Immunities Act (US Code, tit 22 §288 et seq.) decrees that international organizations within the statutory definition (§288), of which the United Nations is one by virtue of Executive Order 9698 (11 Fed Reg 1809 [1946]), and their property and assets wherever located and by whomsoeverheld, 'shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments', except to the extent that such immunity is expressly waived (§288a, subd [b]). Officers and employees of international organizations, in the absence of waiver, 'shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such * * * officers, or employees' (§288, subd [b]); see, generally, United States v Melekh, 190 F Supp 67, 78-79).

The record demonstrates with convincing clarity that the Pension Fund is an organ of the United Nations, subject to regulation by the General Assembly, and that its assets, although held separately from other United Nations property, are the property of that international organization.

The funds which Mrs. Shamsee seeks to sequester, therefore, are impervious to legal process under both section 2 of the Convention and section 288a of title 22 of the United States Code (the International Organizations Immunities Act). Furthermore, Mr. Liveran's refusal to pay Pension Fund moneys to Mrs. Shamsee under the sequestration order clearly constituted an act undertaken in his official capacity as Secretary of the Fund, and he is thus shielded from a contempt finding and its consequences by section 17 of the Convention and by section 288d of title 22 of the United States Code.*

*There has been no waiver of immunity in this case. After he was served with the sequestration order, Mr. Liveran determined that in the absence of a Pension Fund regulation authorizing the waiver, he lacked the power to consent to subject the Fund to legal process. The United Nations Administrative Tribunal upheld that determination (U.N. Ad. Trib. Dec. No. 245 [May, 1979]), but recommended that the Pension Fund adopt a rule similar to U.N. Staff Rule 103.18(b)(iii), which provides that the United Nations' privileges and immunities 'furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations'. There is some indication in the record that the Board of the Pension Fund is about to undertake consideration of such a rule. Our decision today is, of course, without prejudice to Mrs. Shamsee's rights under the sequestration order, dated December 30, 1976, in the event that a rule permitting waiver is adopted by the Pension Fund Board and the Fund in fact waives its immunity from process.

Respondent's contention that the Fund is a commercial entity, distinct from the United Nations proper, does not withstand scrutiny. The very facts adduced to support this argument -- that the Fund's offices are located at the United Nations Headquarters, that the United Nations deposits moneys into the Fund and that the Fund's operation is regulated by the General Assembly -- only underscore the intimate connection between the Fund and its parent organization.

We note additionally that it was error for Special Term to direct the United States Attorney to refer the matter of immunity to the Attorney General for the purpose of obtaining a 'ruling' by the President of the United States pursuant to section 288 of title 22 of the United States Code. That statute grants the President a measure of discretion, to be exercised by 'appropriate Executive order', to withhold, withdraw, make conditional or limit the privileges, exemptions and immunities otherwise conferred on an international organization by the International Organizations Immunities Act. Assuming, arguendo, that the court had personal jurisdiction over the United States, we are unable to find in section 288 any mechanism by which the President may be requested to 'rule' on questions of immunity which arise in judicial proceedings; nor do we find any basis in the statute for an order in the nature of mandamus to any other Executive Branch officer to 'refer' such a matter to the President.

Moreover, since the intervention by the United States to advise the court on

a question of immunity is in the nature of a special appearance (cf. Tsiang v Tsiang, 194 Misc 259, supra), the United States cannot be said to have waived its own sovereign immunity and thus to have subjected itself to the court's personal jurisdiction.

We have examined the respondent's other contentions and find no merit in them.

Accordingly, the order should be reversed, on the law, without costs or disbursements, and the motion granted.

LAZER, J.P., MANGANO and MARGETT, JJ., concur in the opinion of Mr. Justice GIBBONS."

DECISION OF SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS DATED AUGUST 31, 1979:

"SUPREME COURT : QUEENS COUNTY
SPECIAL TERM, PART 5

RAYMONDE SHAMSEE
VS.
MUDDASSIR ALI SHAMSEE

Index No. 5800/75

BY: CALABRETTA, J.

The United States Attorney, appearing on behalf of the United Nations Joint Staff Pension Fund and Arthur C. Liveran, moves herein to vacate and set aside the various orders of this court wherein said Fund and its Secretary were held in contempt for failure to turn over to plaintiff-wife monies on deposit which are held for defendant-husband and which are due to plaintiff-wife under previous orders of this court.

This court has virtually lived with the case for the last three years, and its history grows more grotesque as time progresses.

So that there will be no doubt in anyone's mind, this court unequivocally states its heartfelt desire that plaintiff be able to collect monies justly due her. In this regard, the court has strained and sought to grant plaintiff any relief within its provinces. The equities are clear, but the path is strewn with hazards, the latest of which has been the intervention of the United States Attorney who, in effect, is expending his time and energies protecting a non-citizen who has flaunted, not only

the order of this court and of this State, but all laws of decency as well, against a resident who is being reduced to poverty and charity and seeks simple justice.

It now appears that the Department of State has also, in effect, taken up defendant's cause and has draped over said defendant's monies the cloak of immunity. The court has always been aware that any actions taken by Arthur C. Liveran were in his capacity as secretary of said Pension Fund, and accordingly, he, too, has been clothed with immunity. Therefore, and in a further effort to obtain justice, this court will continue to stay enforcement of its orders. Following this:

(1) The court hereby directs the United States Attorney to refer this matter to the Attorney General, who shall, in turn, refer it to the President of the United States for a 22 USC 288 ruling. Plaintiff shall be given due notice of all proceedings and an opportunity to be head on said reference.

(2) This court will also await any action to be taken by the Board of Pension Fund, which has the matter under consideration, before hearing any further argument on vacating the orders.

Short form order signed simultaneously herewith.

_____

J.S.C."

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS DATED APRIL 27, 1979:

"At a Special Term, Part V of the Supreme Court, held in and for the County of Queens, at Supreme Courthouse, 88-11 Sutphin Blvd., Jamaica, New York on the 27th day of April, 1979

PRESENT: HON. JOSEPH J. CALABRETTA,
Justice.

RAYMONDE SHAMSEE,
Plaintiff,
-against-
MUDDASSIR ALI SHAMSEE,
Defendant.

Index No. 5800/1975

ORDER

The United States Attorney having moved this Court for an Order vacating and setting aside the Orders of this Court dated May 24, 1978 and June 5, 1978 concerning the United Nations Joint Staff Pension Fund and Arthur C. Liveran and declaring that the United Nations Joint Staff Pension Fund and Arthur C. Liveran are not subject to the jurisdiction of this Court, and upon reading and filing the Order to Show Cause dated October 19, 1978, and the affirmations of Joan M. Dolan dated October 19, 1978 and December 1, 1978, which exhibits annexed thereto, having been submitted in support thereof, and the affidavit of Raymonde Shamsee sworn to November 1, 1978 and the affirmation of Bradley B. Davis dated December 15, 1978 having been submitted in opposition

thereto, and this motion having come on regularly before Special Term, Part V of this Court on November 30, 1978 and having been referred to me upon the call of the calendar thereof, and upon the decision of this Court dated February 20, 1979 which has been duly filed,

NOW, upon motion of BRADLEY B. DAVIS, attorney for Raymonde Shamsee, it is

ORDERED that the motion of the United States Attorney is denied without prejudice to renewal on the conditions set forth herein, and it is further

ORDERED that the United States Attorney shall proceed with due diligence, and upon reasonable notice to counsel for plaintiff, to apply to the Department of State for a formal opinion from a person in proper authority therein as to whether or not either the United Nations Joint Staff Pension Fund or Arthur C. Liveran is immune from the jurisdiction of this Court, and to thereupon with due diligence furnish a copy of said opinion to the Court and to counsel for plaintiff, and it is further

ORDERED that pending compliance with this Order, the enforcement of the order of this Court dated June 5, 1978 insofar as it directs the Sheriff to produce Arthur C. Liveran before this Court and in default thereof to arrest Arthur C. Liveran is stayed, with leave to counsel for plaintiff to apply to lift this stay at such time as he believes that the United States Attorney is not proceeding with due diligence pursuant to the terms of this order or at such time as an opinion issues finding that

Arthur C. Liveran is not immune from jurisdiction, and it is further

ORDERED that until such time as the opinion aforesaid is issued by the Department of State, the United States Attorney shall keep counsel for plaintiff and the Court apprised of the whereabouts of Arthur C. Liveran and shall keep in regular communication with Arthur C. Liveran, and shall notify counsel for plaintiff and this Court whenever it learns that Arthur C. Liveran is reasonably likely to leave the jurisdiction other than temporarily, and to this end shall regularly inquire of Arthur C. Liveran concerning his intended future as well as his present relocation plans, and it is further

ORDERED that so long as the Order of June 5, 1978 is in effect, whether or not its enforcement is stayed, Arthur C. Liveran shall not leave the jurisdiction of this Court, other than on a temporary basis for a period not exceeding thirty days without prior notice to counsel for plaintiff and the Court given no less than twenty days prior to the intended departure date.

E N T E R

_____

J.S.C.

Granted April 30, 1978
Clerk, J.J. Durante

Filed May 1, 1979
County Clerk, Queens County"

DECISION OF THE SUPREME COURT OF NEW YORK STATE, QUEENS COUNTY, DATED FEBRUARY 20,1979

SUPREME COURT: QUEENS COUNTY
SPECIAL TERM, PART V Index No. 5800/1975

RAYMONDE SHAMSEE by: CALABRETTA J.

vs.

Dated: February 20, 1979

MUDASSIR ALI SHAMSEE

This is a motion to vacate an order entered June 2, 1978 which held the United Nations Joint Staff Pension Fund (hereinafter UNJSPF) and its Secretary, Arthur C. Liveran, in contempt for failure to obey a sequestration order issued in this matrimonial proceeding.

The court presided at that matrimonial action. During the two week trial period, the defendant, who was then employed by the United Nations, stated under oath, in direct response to the court's questioning, that he had no intention of leaving this court's jurisdiction or his employment with the United Nations. Plaintiff has specifically raised this issue and on several occasions requested the court to issue sequestration orders regarding defendant's assets which were at the time within the court's jurisdiction. Regrettably, the court gave full credence to defendant's statement and did not heed plaintiff's request. Time has proven plaintiff to be correct. The defendant has not only retired from his employment and returned to his native Pakistan, but has taken with him all of his assets except for an interest in the fund.

It is the plaintiff wife's actions in seeking to enforce the judgment of this court, wherein she was awarded alimony, that give rise to this motion. As the plaintiff alleges, defendant

"succeeded in deceiving the Court as to his integrity and then fled the country with all of our (his) bank accounts, securities and investments of a lifetime, even down to the last stick of furniture from the marital domicile. He has well over $100,000 available to him, a princely sum in Pakistan, and that is without his non-official earnings over the years (which, of course, I could not 'prove' at the trial). My only remaining hope of not spending the rest of my life in poverty is the Pension Fund which was the only asset he could not ship or pocket before he clandestinely fled the country."

UNJSPF was established by Resolution 248 (III) of the General Assembly to provide specified benefits for the staff of the United Nations and other organizations of an international character. Article 18 of the regulations of UNJSPF provides that the assets are the property of the fund and shall be acquired, deposited and held in the name of the United Nations on behalf of the participants and beneficiaries of the fund. Other articles of the regulations establish that the Secretary-General of the United Nations exercises control over UNJSPF by, for example, his powers of audit and investment. The Secretary-General appoints the Secretary of UNJSPF, and the United Nations regards him as its employee. The records of the United States Mission to the United Nations, the agency responsible for registering the official status of United Nations employees, lists Arthur C. Liveran as Secretary of UNJSPF, a United Nations employee. The United States Attorney's Office has appeared and argued that UNJSPF and Secretary Liveran are entitled to immunity.

The claim of immunity is initially grounded on the Convention on the Privileges and Immunities of the United Nations (21 UST 1419, TIAF 6900) to which the United States became a party on April 29, 1970. Relevant sections of the Convention are set forth below:

> Section 2. "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."
>
> Section 3. "The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from ... any other form of interference, whether by executive, administrative, judicial or legislative action."
>
> Section 18: "Officials of the United Nations shall: (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity."

The claim of immunity is also grounded on the International Organizations Immunities Act (Public Law 79-291, 22 USC Sec.286 et seq.) relevant sections of which are set forth below

> Section 288a(b): "International Organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments....
>
> Section 288d(b): ...officers and employees of (international) organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity..."

The courts will relinquish jurisdiction wherever the Federal State Department "suggests" the immunity of a foreign soverign (Ex parte Peru, 318 US 578; Isbrandtsen Tankers, Inc. v. President of India, 446 F2d 1193).

"Upon certification to the court that the claim of soverign immunity was recognized and allowed by the Department of State, it became the duty of the judicial department of the government to follow the action of the political branch and to decline an antagonistic jurisdiction to determine independently the claim of immunity." (Matter of United States of Mexico v. Schmuck, 294 NY 265, 270) Similarly, the courts will relinquish jurisdiction where the State Department suggests the immunity of the United Nations (Curran v. City ofNew York, 191 Misc. 229, affd 275 App Div 784; Menon v. Weil, 66 Misc.2d 114, Tsiang v. Tsiang, 194 Misc. 259). However, in the case at bar, there is no adequate proof that an official of the State Department with the proper authority has actually determined the merits of the claim of immunity. Because it is possible the State Department has merely notified the United States Attorney's Office to appear and assert whatever immunities may be involved, this court is not presently in a position to determine the claim of immunity. Accordingly, the motion to vacate is denied without prejudice to a renewal until such time as the United States Department of State has decided the claim of immunity.

The stay granted on October 19, 1978 is continued pending further determination by this court.

Submit order

_____
J.S.C.

ORDER OF SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS DATED SEPTEMBER 8, 1978:

"At a Special Term, Part V of the Supreme Court of the State of New York held in and four the County of Queens, at the Supreme Courthouse thereof, 88-11 Sutphin Blvd., Jamaica, New York on the 8th day of September, 1978

P R E S E N T

HON. JOSEPH J. CALABRETTA,
Justice.

RAYMONDE SHAMSEE,
Plaintiff,

-against-

MUDDASSIR ALI SHAMSEE,
Defendant.

Index No. 5800/1975

ORDER

Upon reading and filing the Order of Sequestration entered herein on December 30, 1976 appointing plaintiff receiver of the assets of defendant with due proof of service thereof upon Arthur C. Liveran and the order to show cause why the aforesaid Arthur C. Liveran not be held in contempt for failing and refusing to comply with the Order of Sequestration aforesaid dated April 25, 1978, with proof of service thereof, and upon the granting of said Order to Show Cause holding the aforesaid Arthur C. Liveran in contempt, by order dated June 6, 1978, which order allowed the aforesaid Arthur C. Liveran to purge himself of contempt by paying to plaintiff, as receiver, any assets to which defendant has claim

held by the United Nations Joint Staff Pnesion Fund, and upon reading and filing the affirmation of Bradley B. Davis dated July 7, 1978 showing due service of said contempt order upon Arthur C. Liveran and his failure to purge himself in the manner specified in said order, and upon the Commitment Order of this Court dated July 31, 1978, and upon the affirmation of Bradley B. Davis dated September 7, 1978, explaining the need for a new order to comply with statutory requisites,

NOW, upon motion of BRADLEY B. DAVIS, attorney for plaintiff, it is

ADJUDGED that Arthur C. Liveran has failed to purge himself of contempt as provided by the order of this Court dated June 6, 1978, and it is further

ADJUDGED that the aforesaid Arthur C. Liveran is hereby held in contempt of the orders of the within court in the within action of December 30, 1978 and June 6, 1978, and it is further

ADJUDGED that the misconduct of Arthur C. Liveran was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein; and is is therefore

ORDERED AND ADJUDGED that the Sheriff of any County to whom a certified copy of this order shall be delivered shall forthwith take into custody the body of Arthur C. Liveran during such hours as this Court may be in session and produce him forthwith before me in Special Term, Part V of the Supreme Court of Queens County and

hold him in close custody until the determination of a hearing pursuant to Section 772 of the Judiciary Law to determine whether said Arthur C. Liveran shall be committed to custody for contempt of court, and for such other and further relief as this Court may deem just and proper.

Justice of the Supreme Court

Granted September 8 , 1978
John J. Durante, Clerk"

ORDER OF SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS DATED JULY 31, 1978:

"At a Special Term, Part V of the Supreme Court of the State of New York held in and for the County of Queens, at the Courthouse thereof, 88-11 Sutphin Blvd, Jamaica, N.Y. on the 31st day of July, 1978

P R E S E N T
HON. JOSEPH J. CALABRETTA,
Justice.

RAYMONDE SHAMSEE,
Plaintiff,

-against-

MUDDASSIR ALI SHAMSEE,
Defendant.

Index No. 5800/1975

COMMITMENT ORDER

Upon reading and filing the Order of Sequestration entered herein on December 30, 1976 appointing plaintiff receiver of the assets of defendant with due proof of service thereof upon Arthur C. Liveran, Secretary of the United Nations Joint Staff Pension Fund, and the order to show cause why the aforesaid Arthur C. Liveran should not be held in contempt for failing and refusing to comply with the Order of Sequestration aforesaid dated April 25, 1978, with proof of service thereof, and upon the granting of said order to show cause holding the aforesaid Arthur C. Liveran in contempt, by order dated June 6, 1978, which order allowed the aforesaid Arthur C. Liveran to purge himself of contempt by paying to plaintiff, as receiver, any assets to which

defendant has held by the United Nations Joint Staff Pension Fund, and upon reading and filing the affirmation of Bradley B. Davis dated July 7, 1978 showing due service of said contempt order upon Arthur C. Liveran and his failure to purge himself in the matter specified upon said order,

NOW, upon motion of BRADLEY B. DAVIS, attorney for plaintiff, it is

ADJUDGED that Arthur C. Liveran has failed to purge himself of contempt as provided by the order of this Court dated June 6, 1978; and it is further

ADJUDGED that his misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein; and it is further

ORDERED that without further notice to the said Arthur C. Liveran, the Sheriff of the City of New York or the Sheriff of any County within the State of New York wherein he may be apprehended shall forthwith arrest him without further process, and commit him to the County Jail of said County and hold him in close custody until he shall have purged himself of contempt as is provided by the order of this Court of June 6, 1978, and paid all Sheriff's fees and the disbursements on the execution of this order, or is otherwise discharged according to law.

_____

Justice of the Supreme Court

Granted
August 1, 1978
J.J. DURANTE "

ORDER AND JUDGMENT OF SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS DATED JUNE 2, 1978:

"At a Special Term, Part V of the Supreme Court, held in and for the County of Queens, at the Supreme Courthouse, 88-11 Sutphin Blvd., Jamaica, New York on the 2nd day of June, 1978

P R E S E N T

HON. JOSEPH S. CALABRETTA, Justice

RAYMONDE SHAMSEE,

Plaintiff, 5800/1975

-against-

MUDDASSIR ALI SHAMSEE, ORDER AND JUDGMENT

Defendant.

Plaintiff having moved this Court for an order to punish the United Nations Joint Staff Pension Fund and Arthur C. Liveran for contempt for failure to obey the order of sequestration heretofore entered herein on December 30, 1976 and heretofre duly served upon them, in particular for failing and refusing to deliver certain assets of defendant in the United Nations Joint Staff Pension Fund to the plaintiff, as receiver, and further for an order compelling said persons to deliver said assets to plaintiff as such receiver, and for such other and further relief as the Court deemed proper, and upon reading and filing the Order to Show Cause of Hon. Joseph J. Kunzeman dated April 25, 1978 and the affirmation of Bradley B. Davis dated

April 21, 1978 and the Exhibits annexed thereto, all with due proof of service thereof, submitted in support thereof and nothing being submitted in opposition thereto, and this matter having come on before me regularly to be heard on May 18, 1978, at a Special Term, Part V of the Queens County Supreme Court, and plaintiff, by Bradley B. Davis, having appeared in support of said order to show cause, and no one having appeared in opposition thereto, and due deliberation having been had thereupon, and upon reading and filing the memorandum decision of this Court having issued on May 24, 1978,

NOW, upon motion of BRADLEY B. DAVIS, attorney for the plaintiff, it is

ORDERED that the Order to Show Cause of plaintiff be and the same hereby is granted in full, and it is further

ORDERED, ADJUDGED AND DECREED that the UNITED NATIONS JOINT STAFF PENSION FUND and ARTHUR C. LIVERAN, and each of them be and they hereby are found to be in contempt of court, and it is further

ORDERED that the aforesaid UNITED NATIONS JOINT STAFF PENSION FUND and ARTHUR C. LIVERAN and each of them may purge themselves of said contempt by paying to the order of plaintiff, as receiver, any assets to which defendant MUDDASSIR ALI SHAMSEE has any claim and which are contained in the UNITED NATIONS JOINT STAFF PENSION FUND within ten days after entry of this Order, and it is further

ORDERED that in the event that the aforesaid UNITED NATIONS JOINT STAFF

PENSION FUND and ARTHUR C. LIVERAN fail to purge themselves of said contempt as aforesaid, a WARRANT shall issue for the ARREST of ARTHUR C. LIVERAN and in addition plaintiff may apply to the Court for such further relief as may be proper by reason of the aforesaid contempt, and it is further

ORDERED that upon service of a copy of this Order with Notice of Entry upon the County Clerk of Queens County said clerk shall enter judgment in favor of plaintiff and against defendant in the sum of $14,100.00, and it is further

ORDERED that out of the funds to be paid to plaintiff, as receiver, from the UNITED NATIONS JOINT STAFF PENSION FUND as aforesaid, she may immediately draw from said receiver fund the sum of $13,600 for support arrears and $500 for counsel fees, and thereupon may from time to time draw such sums from said fund as accord with the order of sequestration or may otherwise be allowed by this Court.

E N T E R

_____

J.S.C.

Granted
June 5, 1978
Clerk"

ORDER OF SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS DATED MAY 24, 1978:

SUPREME COURT : QUEENS COUNTY
SPECIAL TERM, PART 5

RAYMONDE SHAMSEE
VS.
MUDDASSIR ALI SHAMSEE

Index No. 5800/75

BY: CALABRETTA, J.

This motion by plaintiff to punish for contempt of court is granted without opposition.

The United Nations Joint Staff Pension Fund and Arthur C. Liveran are found to be in contempt of court. They may purge themselves of said contempt by obeying the court order of sequestration dated December 30, 1976 and turning over to the plaintiff, as receiver, the assets of defendant, which they now hold. Upon receipt of said assets, plaintiff may draw the sum of $13,600 as and for arrears from January, 1977 through May 31, 1978, in addition to the $250 counsel fees granted on December 30, 1976 and $250 as and for counsel fees for the prosecution of this motion.

Furhter, a judgment shall be entered by the County Clerk of Queens County in favor of plaintiff against the defendant in the total sum of $14,100.

Upon the failure of Arthur C. Liveran to so purge himself, a warrant shall issue for his arrest.

Settle judgment.

J.S.C."

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS, DATED DECEMBER 30, 1976

PRESENT: HON. ANGELO GRACI/ SPECIAL TERM PART 5 JUSTICE

RAYMONDE SHAMSEE -against- MUDDASSIR ALI SHAMSEE

Index No.5800,1975
Motion Date Dec. 20, 1976
Motion Cal.Number 13

The following papers number 1 to 4 read on this motion for an or-er directing sequestration of the assets of the defendant and related relief

Papers Numbered
Order to Show Cause-Affidavits-Exhibits 1-4

Upon the foregoing papers it is ordered that this motion is granted without opposition. A copy of this order is to be served upon the defendant by certified mail directed to his last known address

December 30, 1976 Angelo Graci J.S.C.

At a Special Term, Part II of the Supreme Court, held in and for the County of Queens, at the Supreme Courthouse, 88-11 Sutphin Blvd., Jamaica, New York, on the 14th day of December, 1976

PRESENT: HON. WILLIAM S. GIACCIO Justice

RAYMONDE SHAMSEE -against- MUDDASSIR ALI SHAMSEE

Index No. 5800/75

ORDER TO SHOW CAUSE

Upon reading and filing the affidavit of RAYMONDE SHAMSEE, sworn to the 13th day of December, 1976, and the affirmation of BRADLEY B. DAVIS dated the 13th day of December, 1976, and sufficient cause appearing therefor, let the defendant or his attorney show cause, at a Special Term, Part V of this Court, to be held in and for the County of Queens, Supreme Courthouse, 88-11 Sutphin Blvd., Jamaica, New York, on 20th day of December, 1976 at 9:30 A.M. why an order should not issue sequestering all of the assets of the defendant, real and personal, tangible and intangible, within the State of New York, and appointing plaintiff the receiver thereof, and transferring title thereto to plaintiff as receiver, allowing her to draw from the income or principal thereof the sum of $200 per week plus $250 counsel fees without order of this Court, and such further sums as this Court may from time to time order, without the posting of bond, together with such other and further relief as this Court may deem proper,

SUFFICIENT CAUSE appearing therefor, upon service of a copy of this Order upon any bank, financial institution, stock company or other person holding and property in which Mr. Shamsee has any interest, said body or person be and they hereby are stayed from transferring such property out of New York State or to any third party pending final determination of this motion.

SUFFICIENT CAUSE FURTHER APPEARING THEREFOR let service of a copy of this Order and the papers upon which it is based by posting a copy thereof on the door of defendant's last residence address and delivering a copy thereof to defendant's trial attorneys on or before the 15th day of December, 1976 be deemed sufficient.

ENTER

Granted Dec.14,1976 W.G.G.

John J. Durante Clerk J.S.C.

BRADLEY B. DAVIS
Attorney for Petitioner
1235 Park Avenue
New York, N.Y. 10028
212-876-1609

Office - Supreme Court, U.S.
FILED
SEP 11 1981
ALEXANDER L. STEVAS
CLERK

No. 81-39

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMONDE SHAMSEE, PETITIONER

v.

UNITED NATIONS JOINT STAFF PENSION FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

LEONARD SCHAITMAN
SUSAN HERDINA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the United Nations Joint Staff Pension Fund and its Secretary are immune under the Convention on the Privileges and Immunities of the United Nations of Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, and the International Organizations Immunities Act, 22 U.S.C. 228 *et seq.*, from a sequestration order and subsequent enforcement orders issued by a state court.

2. Whether a state court has power to order a United States Attorney to obtain a ruling from the President of the United States as to the applicability of an immunity defense under the International Organizations Immunities Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-39

RAYMONDE SHAMSEE, PETITIONER

v.

UNITED NATIONS JOINT STAFF PENSION FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of New York (Pet. App. A1) is reported at 53 N.Y.2d 739 and 439 N.Y.S.2d 356. The opinion of the Appellate Division of the Supreme Court of New York, Second Judicial Department (Pet. App. A2-A10), is reported at 74 App. Div.2d 357 and 428 N.Y.S.2d 33. The orders of the Supreme Court of New York, County of Queens (Pet. App. A11-A30), are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1981. The petition for a writ of certiorari was filed on July 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

TREATY AND STATUTES INVOLVED

Article II, Section 2 of the Convention on the Privileges and Immunities of the United Nations of Feb. 13, 1946, 21 U.S.T. 1418, 1422, T.I.A.S. No. 6900, provides:

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Article V, Section 18 of the same Convention, 21 U.S.T. 1418, 1432, provides in pertinent part:

> Officials of the United States shall:
>
> (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

Other treaty and statutory provisions involved are reproduced at Pet. 7-10.

STATEMENT

In May 1976, petitioner obtained a support award of $200 per week against her husband, Muddassir Ali Shamsee, a Pakistani national who was then employed by the United Nations in New York (Pet. App. A3). Six months later, Mr. Shamsee retired from his United Nations job and returned to his homeland, allegedly taking with him all of the family assets, except for his accrued retirement benefits held by respondent United Nations Joint Staff Pension Fund (Fund) (*ibid.*).

To secure her support payments, petitioner filed this action in the Supreme Court of New York and obtained an order on December 30, 1976, directing sequestration of all of her husband's assets still located within the State of New York (Pet. App. A29-A30). Petitioner, seeking her husband's interest in the Pension Fund, then served a sequestration order on respondent Arthur C. Liveran, Secretary of the Fund (*id.* at A3).

Respondent Liveran declined to comply with the order, asserting immunity from legal process for himself, in his official capacity, and the Fund. The New York Supreme Court rejected respondents' claim of immunity and entered a series of orders citing them for contempt and ordering respondent Liveran arrested (Pet. App. A20, A23, A25, A28).

At the request of the United States Department of State, the United States Attorney for the Eastern District of New York entered an appearance on behalf of respondents before the New York Supreme Court. Respondents then filed a motion to stay and vacate the prior orders on the ground that they enjoyed absolute immunity from legal process under the Convention on the Privileges and Immunities of the United Nations of Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, and the International Organizations Immunities Act, 22 U.S.C. 288 *et seq.* (Pet. App. A3). In support of the motions, respondents submitted two affidavits. The first, by Erik Suy, the Under-Secretary-General and Legal Counsel of the United Nations, explained that the Fund is an organ of the United Nations, regulated by the General Assembly, and that its assets are the property of the United Nations. It also stated that the Fund's Secretary is appointed by the Secretary-General of the United Nations and that both the Fund and the Secretary are immune from process (*id.* at A4). The second affidavit was by Sol Kuttner, a member of the United States Mission to the United Nations responsible for maintaining records concerning United Nations officials entitled to immunity. He attested to respondent Liveran's status as an official employed by the Fund and is thereby entitled to immunity for actions performed in his official capacity (*id.* at A4-A5).

The court granted the motion to stay, but on February 20, 1979, it denied the motion to vacate and ordered the United States Attorney to obtain a formal opinion from the

United States Department of State on the immunity issue (Pet. App. A5, A14, A19). The Department of State's Deputy Legal Adviser then submitted a letter to the court, expressing the view that respondents were entitled to immunity from the sequestration order (*id.* at A5). The court was not satisfied by this submission, however, and ordered the United States Attorney to refer the matter to the Attorney General, who in turn was to refer the issue to the President of the United States for a ruling on whether 22 U.S.C. 288 immunized these respondents from legal process (Pet. App. A12).

The Appellate Division of the Supreme Court reversed (Pet. App. A2-A10). The appellate court first held that the question of immunity under the treaties was a proper matter for the courts to decide, and therefore the court below had erred in insisting on a formal opinion from the State Department (*id.* at A6). On the issue of immunity, the appellate division held that both the Convention on the Privileges and Immunities of the United Nations and the International Organizations Immunities Act immunized respondents from the sequestration orders (*id.* at A6-A9). Finally, the court held that it was error to order the United States Attorney to obtain a ruling on immunity from the President, both because 22 U.S.C. 288 does not authorize a court to order the President to rule on an immunity question and because the trial judge lacked personal jurisdiction over the United States (Pet. App. A9-A10).

The New York Court of Appeals affirmed "for reasons stated in the opinion by * * * the Appellate Division" (Pet. App. A1).

ARGUMENT

The decision of the New York Court of Appeals that respondents enjoy absolute immunity from process in this case is a correct application of federal law and does not

conflict with any decision of any other court. Further review by this Court, therefore, is unwarranted.

1. The Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1418, T.I.A.S. No. 6900, is unambiguous in the immunity it confers: "[T]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process * * *." This protection also extends to United Nations officials, who shall "be immune from legal process * * * (with respect to) * * * all acts performed by them in their official capacity * * *." See *Menon* v. *Weil*, 66 Misc.2d 114, 116, 320 N.Y.S.2d 405, 407 (Civ. Ct. 1971).

Similar immunity is provided by statute in the International Organizations Immunities Act, 22 U.S.C. 288a(b), which states that "[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments * * *."[1] As with the treaty, this immunity extends to "the officers and employees of such organizations." 22 U.S.C. 288d(a).

Petitioner does not dispute the obvious intent of these provisions to confer immunity broadly upon officials of the United Nations. Instead, she asserts (Pet. 20-23) that it was error for the Court of Appeals to conclude that these immunity provisions apply to these particular respondents without requiring a hearing. A hearing in this case, however, would have been superfluous in light of the uncontradicted affidavits filed with the New York Supreme Court. As the appellate division held (Pet. App. A7):

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[1]By Exec. Order No. 9698, 11 Fed. Reg. 1809 (1946), the President has designated the United Nations as an organization within the definition of the IOIA, thereby entitled to enjoy the immunities conferred by the Act.

> The record demonstrates with convincing clarity that the Pension Fund is an organ of the United Nations, subject to regulation by the General Assembly, and that its assets, although held separately from other United Nations property, are the property of that international organization.

Petitioner also attempts (Pet. 16-17) to avoid the plain grant of immunity contained in the treaty and statute by claiming that the activity of the Pension Fund is a "commercial activity" and therefore expressly excluded from immunity by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611. Petitioner cites no case to support her view that the administration of the assets of a pension fund for the benefit of an international organization's employees is a commercial activity within the meaning of the Act. Indeed, the contrary conclusion is much more reasonable. See *Broadbent* v. *Organization of American States*, 628 F. 2d 27, 33-35 (D.C. Cir. 1980). Moreover, Section 1611 provides that, notwithstanding the other provisions of the FSIA, "the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organization's Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to * * * a foreign state." Thus, to the extent that the FSIA applies to a case not directly involving a foreign state, see *International Ass'n of Machinists* v. *OPEC*, 477 F. Supp. 553, 560 (C.D. Cal. 1979), aff'd, 649 F. 2d 1354 (9th Cir. 1981), it expressly exempts from its coverage the assets of organizations such as the United Nations.

2. Petitioner's second argument (Pet. 24-25) that a state court has "ancillary power" to grant a writ of mandamus requiring the President of the United States to decide an issue of immunity is frivolous. It is well settled that state

courts have no power to mandamus any federal official, let alone the President. *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821). Indeed, this would seem particularly true where, as here, the United States is not even a party to the lawsuit. The cases cited by petitioner (*Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867); *Board of Commissioners of Knox County* v. *Aspinwall*, 65 U.S. (24 How.) 376 (1860)) involved the power of federal courts to mandamus state officials and are obviously inapposite. In any event, 22 U.S.C. 288 does not authorize any court, state or federal, to demand an immunity determination from the President.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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